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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 RUBEN TRONCOSO,) Civil No.12-1708-WQH(WVG)
12)
13) Petitioner,) REPORT AND RECOMMENDATION
14) GRANTING RESPONDENT'S
15) MOTION TO DISMISS
16) (DOC. NO. 13)
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18 Ruben Troncoso ("Petitioner"), a state prisoner
19 proceeding *pro se*^{1/}, has filed a Petition For Writ of
20 Habeas Corpus pursuant to 28 U.S.C. §2254. Respondent
21 David Long ("Respondent") has filed a Motion to Dismiss
22 the Petition. Petitioner has filed an Opposition to the
23 Motion to Dismiss. The Court ordered Respondent to file a
24 Reply to Petitioner's Opposition to the Motion to Dismiss.
25 Respondent filed a "Response To Petitioner's Opposition to
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^{1/}While Petitioner filed his Petition *pro se*, he is now represented by
counsel who filed Petitioner's Opposition to Respondent's Motion to Dismiss and
Reply on his behalf.

1 Respondent's Motion To Dismiss." Petitioner filed a Reply
2 to Respondent's Response.

3 The Court, having reviewed Petitioner's Petition,
4 Respondent's Motion to Dismiss, Petitioner's Opposition to
5 the Motion to Dismiss, Respondent's Response to Peti-
6 tioner's Opposition, Petitioner's Reply to Respondent's
7 Response, and the lodgments presented therewith, finds
8 that Petitioner is not entitled to the relief requested
9 and that Petitioner's Petition is barred by the statute of
10 limitations. Therefore, the Court RECOMMENDS that Respon-
11 dent's Motion to Dismiss be GRANTED.

12 I

13 PROCEDURAL HISTORY

14 A jury found Petitioner guilty of possession of
15 cocaine for sale, in violation of California Health &
16 Safety Code §11351^{2/} (counts 1, 7), transportation of
17 cocaine [§11352(a), counts 2, 8), transportation of
18 cocaine for sale or distribution to a non-contiguous
19 county [§11352(b), counts 3, 9], conspiracy to possess
20 cocaine for sale [§11351, Cal. Penal Code §182(a)(1),
21 counts 4, 10], conspiracy to transport cocaine [§11352(a),
22 Cal. Penal Code §182(a)(1), counts 5, 11], and conspiracy
23 to transport cocaine for sale or distribution to a non-
24 contiguous county [§11352(b), Cal. Penal Code §182(a)(1),
25 counts 6, 12]. Counts one through six alleged acts occur-

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27
28 ^{2/}All references to code sections are to the California Health & Safety
Code, unless otherwise noted.

1 ring on October 12, 2005, while counts seven through
2 twelve alleged acts occurring on October 28, 2005.

3 The trial court sentenced Petitioner to 33 years
4 imprisonment, but awarded him 729 days of actual custody
5 credits plus 364 conduct credits pursuant to Cal. Penal
6 Code §4019, for a total of 1,093 days of presentence
7 credits. (Respondent's Lodgment No. 1 at 1-2).

8 Petitioner appealed his convictions to the Califor-
9 nia Court of Appeal. (Respondent's Lodgment No. 1). On
10 July 29, 2010, the Court of Appeal reversed Petitioner's
11 convictions on counts 2, 4, 5, 6, 8, 10, 11 and 12, but
12 otherwise affirmed the trial court's judgment. The Court
13 of Appeal remanded the case to the trial court to recalcu-
14 late Petitioner's presentence custody credits according to
15 the amended version of Cal. Penal code §4019, amend the
16 abstract of judgment, and forward a copy of the amended
17 abstract of judgment to the Department of Corrections and
18 Rehabilitation. (Respondent's Lodgment No. 1 at 23).

19 On August 7, 2010, the California Court of Appeal
20 modified its July 29, 2010 opinion, but stated: "There is
21 no change in the judgment." (Respondent's Lodgment No. 1).

22 On October 6, 2010, the Imperial County Superior
23 Court filed an Amended Abstract of Judgment in which it
24 recalculated Petitioner's presentence custody credits.
25 (Respondent's Lodgment No. 13).

26 Petitioner did not file a Petition for Review in the
27 California Supreme Court. (Respondent's Lodgment No. 2).

28

1 On August 10, 2011, Petitioner constructively^{3/} filed
2 a Petition For Writ Of Habeas Corpus in the California
3 Court of Appeal. (Respondent's Lodgment No. 3). On August
4 22, 2011, the Court of Appeal denied the Petition, stating
5 that Petitioner failed to file the Petition in the appro-
6 priate court. (Respondent's Lodgment No. 4).

7 On September 16, 2011, Petitioner constructively^{4/}
8 filed a Petition for Writ of Habeas Corpus in the Imperial
9 County Superior Court. (Respondent's Lodgment No. 5). On
10 November 8, 2011, the Petition was denied as untimely.
11 (Respondent's Lodgment No. 6).

12 On December 6, 2011, Petitioner constructively^{5/}
13 filed another Petition For Writ Of Habeas Corpus in the
14 Imperial County Superior Court. (Respondent's Lodgment No.
15 7). On January 11, 2012, the Superior Court denied the
16 Petition for Petitioner's failure to provide a declaration
17 to support his explanation for his delay in filing the
18 Petition and for failure to move for reconsideration of
19 the November 8, 2011 denial, pursuant to the requirements
20 of California law. (Respondent's Lodgment No. 8).

21 On January 24, 2012, Petitioner filed a second
22 Petition for Writ of Habeas Corpus in the California Court
23 of Appeal. (Respondent's Lodgment No. 9). On February 28,
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25 ^{3/}The Court gives Petitioner the benefit of the "mailbox rule" which deems
26 that a petition is constructively filed when it is delivered to prison officials
27 for filing. Houston v. Lack, 487 U.S. 266(1988).

28 ^{4/}See footnote 2.

^{5/}See footnote 2.

1 2012, the Court of Appeal denied the Petition. (Respon-
2 dent's Lodgment No. 10).

3 On February 5, 2012, Petitioner filed a Petition for
4 Review in the California Supreme Court. (Respondent's
5 Lodgment No. 11).^{6/} On June 13, 2012, the California
6 Supreme Court denied the Petition without comment. (Re-
7 spondent's Lodgment No. 12).

8 On June 24, 2012, Petitioner constructively^{7/} filed
9 a Petition for Writ of Habeas Corpus in this Court. On
10 April 29, 2013, Respondent filed the Motion to Dismiss
11 that is now before the Court. On June 25, 2013, Petitioner
12 filed an Opposition to the Motion to Dismiss. On August 1,
13 2013, Respondent filed a Response to Petitioner's Opposi-
14 tion to the Motion to Dismiss. On August 7, 2013, Peti-
15 tioner filed a Reply to Respondent's Response.

16 II

17 PETITIONER'S PETITION IS BARRED

18 BY THE STATUTE OF LIMITATIONS

19 1. The AEDPA's One-Year Statute of Limitations

20 Respondent argues that the Petition is barred by the
21 Antiterrorism and Effective Death Penalty Act's ("the
22 AEDPA") statute of limitations. The provisions of the
23 AEDPA apply to petitions for writs of habeas corpus filed
24 in federal court after the AEDPA's effective date of April
25 24, 1996. Lindh v. Murphy, 521 U.S. 320, 117 S. Ct. 2059,

26
27 ^{6/}It appears that Petitioner filed his Petition in the California Supreme
28 Court on February 5, 2012 before the Court of Appeal had ruled (on February 28,
2012) on his Petition filed in that court.

^{7/}See footnote 2.

1 2068 (1997). Therefore, because the Petition was filed on
2 June 24, 2012, the AEDPA applies to this case.

3 Prior to the enactment of the AEDPA on April 24,
4 1996, "state prisoners had almost unfettered discretion in
5 deciding when to file a federal habeas petition." Calderon
6 v. United States Dist. Court (Beeler), 128 F.3d 1283, 1286
7 (9th Cir. 1997), cert. denied, 118 U.S. 897 (1998),
8 *overruled on other grounds by* Calderon v. United States
9 Dist. Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998).
10 "[D]elays of more than a decade did not necessarily bar a
11 prisoner from seeking relief." Id.

12 With enactment of the AEDPA, a state prisoner's time
13 frame for seeking federal habeas relief was dramatically
14 limited. The AEDPA amended 28 U.S.C. § 2244 by, in part,
15 adding subdivision (d), which provides for a one-year
16 limitation period for state prisoners to file habeas
17 corpus petitions in federal court. Section 2244(d)
18 states, in pertinent part:

19 (d)(1) A 1-year period of limitation shall apply
20 to an application for a writ of habeas corpus by a
21 person in custody pursuant to the judgment of a
State court. The limitation period shall run from
the latest of -

22 (A) the date on which the judgment became
23 final by the conclusion of direct review
24 or the expiration of the time for seeking
such review;

25 (B) the date on which the impediment
26 to filing an application created by
27 State action in violation of the
Constitution or laws of the United
28 States is removed, if the applicant
was prevented from filing by such
State action;

1 (C) the date on which the constitu-
2 tional right asserted was initially
3 recognized by the Supreme Court, if
4 the right has been newly recognized
by the Supreme Court and made retro-
actively applicable to cases on col-
lateral review; or

5 (D) the date on which the factual
6 predicate of the claim or claims
7 presented could have been discovered
through the exercise of due dili-
gence.

8 (2) The time during which a properly filed
9 application for State post-conviction or other
10 collateral review with respect to the perti-
11 nent judgment or claim
is pending shall not be counted toward any period of
limitation under this subsection.

12 Petitioner timely appealed his convictions to the
13 California Court of Appeal. On July 29, 2010, the Court of
14 Appeal reversed several of Petitioner's convictions and
15 remanded the case to the Superior Court to recalculate
16 Petitioner's presentence custody credits and amend the
17 Abstract of Judgment. On October 6, 2010, the Imperial
18 County Superior Court filed an Amended Abstract of Judg-
19 ment in which it recalculated Petitioner's presentence
20 custody credits. Petitioner did not appeal the Amended
21 Judgment.

22 Respondent argues that Petitioner's conviction
23 became final on September 7, 2010 because Petitioner did
24 not appeal the Amended Judgment to the California Supreme
25 Court. Respondent avers that Petitioner's conviction
26 became final 40 days after the California Court of Appeal
27 filed its opinion on July 29, 2010. Respondent cites
28 California Rules of Court 24(a), 28(b), 45(1) and Smith v.

1 Duncan, 297 F.3d 809 (9th Cir. 2002), abrogated on other
2 grounds by Pace v. DiGuglielmo, 544 U.S. 408 (2005).
3 Respondent's argument in this regard is unavailing.

4 California Rule of Court 24(a) has been renumbered.
5 The Rule's new number is 8.264 which states in pertinent
6 part: "(A) Court of Appeal decision in a *civil* appeal,...
7 is final in that court 30 days after filing." (emphasis
8 added). Since Petitioner's appeal was in a criminal case,
9 California Rule of Court 24(a) and/or 8.264 are inapplica-
10 ble.

11 California Rule of Court 28(b) has been renumbered.
12 The Rule's new number is 8.500 which states that a Peti-
13 tion for Review must be filed and served within 10 days
14 after a Court of Appeal's decision is final in that court.
15 Since Petitioner did not file a Petition for Review,
16 California Rule of Court 28(b) and/or 8.500 are inapplica-
17 ble.

18 California Rule of Court 45(b) has been renumbered.
19 The Rule's new number is 8.600, which applies to death
20 sentence appeals. Since there is no death sentence in this
21 case, California Rule of Court 45 and/or 8.600 are inap-
22 plicable.

23 Further Respondent ignores the fact that the Court
24 of Appeal remanded the case to the Superior Court to
25 recalculate Petitioner's presentence custody credits.

26 Petitioner correctly argues that his conviction
27 became final at the end of the time he could have sought
28 review by the California Court of Appeal of the Superior

1 Court's Amended Abstract of Judgment in which the Superior
2 Court recalculated Petitioner's presentence custody
3 credits. U.S. v. Colvin, 204 F.3d 1221, 1224 (9th Cir.
4 2000)["...remand orders... leave matters for the (trial)
5 court to decide."] See also Coville v. McKenna, 192 Fed.
6 Appx. 641, 642, 2006 WL 2076519 (9th Cir. 2006). Petitioner
7 could have appealed the trial court's recalculation of his
8 presentence credits, but he did not do so. In California,
9 a judgment must be appealed within 60 days of the date of
10 the judgment. (Cal. Rules of Court 8.308). Therefore,
11 Petitioner's conviction became final on December 5, 2010,
12 60 days after October 6, 2010, the date of the Superior
13 Court's Amended Abstract of Judgment.

14 Therefore, absent tolling, Petitioner had one year
15 or until December 6, 2011, to file his Petition For Writ
16 of Habeas Corpus in this Court.^{8/} However, as explained in
17 detail below, Petitioner failed to file the Petition in
18 this Court within the one-year prescribed by 28 U.S.C.
19 §2244(d)(1), thus making it untimely and barred by the
20 statute of limitations.

21 Petitioner filed multiple petitions for post-convic-
22 tion relief in the California Superior, Appellate, and
23 Supreme Courts. The statute of limitations is tolled while
24 a "properly filed" state habeas corpus petition is "pend-
25 ing" in the state court. Under the holding of Nino v.
26 Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), the "statute

27
28 ^{8/}The statute of limitations period starts on the day after a petitioner's conviction and sentence become final under the state's procedural rules. Ford v. Gonzalez, 683 F.3d 1230, 1237 (9th Cir. 2012).

1 of limitations is tolled from the time the first state
2 habeas petition is filed until the California Supreme
3 Court rejects petitioner's final collateral challenge,"
4 provided the petitions were properly filed and pending
5 during that entire time. The statute of limitations is not
6 tolled from the time a final decision is issued on direct
7 state appeal and the time the first state collateral
8 challenge is filed because there is no case "pending"
9 during that interval. Nino, 183 F.3d at 1006

10 The meaning of the terms "properly filed" and
11 "pending" in Nino have been clarified by the United States
12 Supreme Court. In Artuz v. Bennett, 531 U.S. 4, 8, 121
13 S.Ct 361 (2000), the Court held that a state application
14 for post-conviction review is "properly filed" "when its
15 delivery and acceptance are in compliance with the appli-
16 cable laws and rules governing filing," "which usually
17 prescribe the form of the document, the time limits upon
18 its delivery, the court and office in which it must be
19 lodged and the requisite fee." In Carey v. Saffold, 536
20 U.S. 214 (2002), the Court held that the time between
21 denial in a lower California court and the filing of a
22 subsequent petition in the next higher court does not toll
23 the statute of limitations, if the petition is ultimately
24 found to be untimely. Id. at 223-226. In Pace v.
25 DiGuglielmo, 544 U.S. 408 (2005), the Court held that
26 statutory tolling is not available for the period a
27 petition is under consideration, if it is dismissed as
28 untimely. Id. at 413.

1 Petitioner's first petition for relief after his
2 convictions and sentence became final was filed on August
3 10, 2011 in the California Court of Appeal. On August 22,
4 2011, the California Court of Appeal denied the Petition
5 for failure to file the Petition in the appropriate court.
6 On September 16, 2011, Petitioner filed a Petition for
7 Writ of Habeas Corpus in the Imperial County Superior
8 Court. On November 8, 2011, the Superior Court denied the
9 Petition as untimely. On December 6, 2011, Petitioner
10 filed another Petition for Writ of Habeas Corpus in the
11 Imperial County Superior Court. On January 11, 2012, the
12 Superior Court denied the Petition for Petitioner's
13 failure to provide a declaration in support of his expla-
14 nation for the delay in filing the Petition and for
15 failure to follow California's procedural rules.

16 Petitioner waited until August 10, 2011 to file a
17 Petition for Writ of Habeas Corpus in the California Court
18 of Appeal. From December 6, 2010, (the day after Peti-
19 tioner's conviction became final), to August 10, 2011,
20 (the date Petitioner filed his first Petition for Writ of
21 Habeas Corpus in the California Court of Appeal), **247 days**
22 (8 months, 4 days) elapsed in which the statute of limita-
23 tions was not tolled. Nino, 183 F.3d at 1006.

24 On August 22, 2011, the California Court of Appeal
25 denied the Petition without prejudice to Petitioner filing
26 it in the Imperial County Superior Court. On September 6,
27 2011, Petitioner filed a Petition for Writ of Habeas
28 Corpus in the Imperial County Superior Court. From August

1 10, 2011 (the date Petitioner filed a Petition for Writ of
2 Habeas Corpus in the California Court of Appeal) to August
3 22, 2011 (the date the California Court of Appeal denied
4 the Petition without prejudice to refiling in the proper
5 court), a period of 12 days, the statute of limitations
6 was tolled. Cross v. Sisto, 676 F.3d 1172, 1179 (9th Cir.
7 2012).

8 The Petitions for Writ of Habeas Corpus that Peti-
9 tioner filed on September 16, 2011 (in the Imperial County
10 Superior Court), and December 6, 2011 (in the Imperial
11 County Superior Court) did not toll the statute of limita-
12 tions. In each of these Petitions, the courts in which
13 they were filed found them to be untimely, and procedur-
14 ally deficient. As a result, they were not "properly
15 filed" and do not toll the statute of limitations. 28
16 U.S.C.2244(d)(2), Artuz, 531 U.S. at 8.

17 Therefore, from August 22, 2011 (the date the
18 California Court of Appeal denied the Petition without
19 prejudice to refiling it in the proper court) to January
20 11, 2012 (the date the Imperial County Superior Court
21 denied Petitioner's second Petition for Writ of Habeas
22 Corpus in that court), **142 days** (4 months, 20 days)
23 elapsed when the statute of limitations was not tolled.

24 On June 24, 2012, Petitioner filed the Petition for
25 Writ of Habeas Corpus that is now pending before this
26 Court. From June 13, 2012 (the date the California Supreme
27 Court denied his Petition for Writ of Habeas Corpus in
28 that court) to June 24, 2012, the statute of limitations

1 was not tolled because there was no case pending during
2 that interval. Nino, 183 F.3d at 1006. From June 13, 2012
3 to June 24, 2012, 11 days elapsed. Therefore the statute
4 of limitations was not tolled for **11 days**.

5 Petitioner argues that he is entitled to statutory
6 tolling of the statute of limitations for his September
7 16, 2011 and December 6, 2011 Petitions for Writ of Habeas
8 Corpus filed in the Imperial County Superior Court. The
9 September 16, 2011 Petition (Respondent's Lodgment No. 5)
10 was denied as untimely on November 8, 2011. (Respondent's
11 Lodgment No. 6). The December 6, 2011 Petition (Respon-
12 dent's Lodgment No. 7) was denied as untimely and for
13 other procedural reasons on January 11, 2012 (Respondent's
14 Lodgment No. 8). Thereafter, on January 24, 2012, Peti-
15 tioner filed a Petition for Writ of Habeas Corpus in the
16 California Court of Appeal (Respondent's Lodgment No. 9).
17 On February 28, 2012, the California Court of Appeal
18 denied the Petition on the merits. It did not address the
19 timeliness of the Petition. Therefore, Petitioner contends
20 that the California Court of Appeal impliedly overruled
21 the untimeliness findings of the Imperial County Superior
22 Court, thereby allowing for statutory tolling of the
23 statute of limitations. Petitioner cites Campbell v.
24 Henry, 614 F.3d 1056, 1060-1061 (9th Cir. 2010) and
25 Trigueros v. Adams, 658 F.3d 983, 990 (9th Cir. 2011) to
26 support his position. Also, Petitioner argues that he
27 "expressly presented the timeliness issue in his Petition
28

1 for Writ of Habeas Corpus constructively filed in" the
2 California Court of Appeal on January 24, 2012.

3 Respondent argues that Petitioner's argument lacks
4 merit because, pursuant to Evans v. Chavis, 546 U.S. 189,
5 194 (2006), a federal court should not presume that a
6 California court's denial of a petition for writ of habeas
7 corpus on the merits means that the petition was timely.
8 Moreover, Campbell and Trigueros identify unique circum-
9 stances, not present here, in which it may be found that
10 a California appellate court has impliedly overruled a
11 Superior Court's finding of untimeliness.

12 In Evans, the U.S. Supreme Court held that a federal
13 court should not presume that a California court's denial
14 on the merits of a petition for writ of habeas corpus
15 means that the petition was timely. In Evans, the court
16 stated: "(T)he Ninth Circuit must not take 'such words'
17 (the words 'on the merits') as an absolute bellwether on
18 the timeliness question." "An approach that presumes that
19 an order denying a petition 'on the merits' means that the
20 petition was timely would lead to the tolling of AEDPA's
21 limitation period in circumstances where the law does not
22 permit tolling." Evans, 546 U.S. at 194-195.

23 In Campbell, the Ninth Circuit held that statutory
24 tolling applies to state petitions for writs of habeas
25 corpus that are denied as untimely if a higher court later
26 reverses the untimeliness finding. Campbell, 614 F.3d
27 1060-1061.

1 In Trigueros, the Ninth Circuit did not presume that
2 the California Supreme Court's order denying Trigueros'
3 petition automatically meant that the court considered and
4 found Trigueros' petition timely. Instead, it found
5 "compelling circumstances" indicating that the California
6 Supreme Court considered and rejected the timeliness
7 argument. The "compelling circumstances" present in
8 Trigueros were (1) the California Supreme Court requested
9 briefing on the merits, even though the Superior Court
10 found Trigueros' petition untimely and the California
11 Court of Appeal summarily denied the petition filed in
12 that court, and (2) the state and Trigueros briefed the
13 timeliness issue, thereby having before it all of the
14 timeliness arguments of the parties. The Trigueros court
15 considered Trigueros' petition timely because the Califor-
16 nia Supreme Court had the timeliness question before it,
17 but did not cite to any case involving untimeliness of the
18 petition.

19 Here, the Imperial County Superior Court found
20 Petitioner's September 16, 2011 and December 6, 2011
21 Petitions to be untimely. Thereafter, Petitioner filed a
22 Petition for Writ of Habeas Corpus in the California Court
23 of Appeal. On February 28, 2012, the California Court of
24 Appeal denied the Petition on the merits. It *did not*
25 reverse the Superior Court's findings of untimeliness.
26 Therefore, Campbell does not apply to Petitioner's Peti-
27 tions to the Imperial County Superior Court.

1 Moreover, the California Court of Appeal *did not*
2 request briefing on the merits of the Petition or on the
3 timeliness issue. (Respondent's Lodgment No. 14). There-
4 fore, the Court concludes that the compelling circum-
5 stances present in Trigueros *are not present* in this case.

6 Petitioner's claim that he expressly presented the
7 timeliness issue in his January 24, 2012 Petition for Writ
8 of Habeas Corpus in the California Court of Appeal is
9 unavailing. Petitioner's presentation of the timeliness
10 issue states that (1) he has always used due diligence to
11 bring the issue presented in the Petition before the
12 Court, (2) he first learned of the Court of Appeal's July
13 29, 2010 decision in April 2011, (3) two months later in
14 mid-June 2011, he consulted another prisoner regarding his
15 case, (4) in July 2011, the other prisoner advised him
16 about the substantive issue raised in the Petition (Re-
17 spondent's Lodgment No. 9 at 13), and (5) the other
18 prisoner agreed to prepare the Petition for Petitioner.
19 (Respondent's Lodgment No. 9 at 14). The presentation also
20 includes a general recitation of the dates Petitioner
21 filed his various Petitions for Writ of Habeas Corpus.
22 (Respondent's Lodgment No. 9 at 14).

23 The Court finds that Petitioner did not, in fact,
24 address the timeliness issue. If Petitioner had addressed
25 the timeliness issue, he would have argued to the Court of
26 Appeal that his September 16, 2011 and December 6, 2011
27 Petitions for Writ of Habeas Corpus filed in the Imperial
28 County Superior Court were indeed timely, despite the fact

1 that the Imperial County Superior Court found them to be
2 untimely. However, his presentation to the Court of Appeal
3 contains no such argument or discussion. Further, Peti-
4 tioner's consultation with another prisoner about his case
5 appears to have concerned the substantive issue raised in
6 the Petition, not the timeliness issue.

7 As a result, Petitioner is not entitled to statutory
8 tolling of the statute of limitations for his September
9 16, 2011 and December 6, 2011 Petitions filed in the
10 Imperial County Superior Court. See also Roe v. Lewis,
11 2012 WL 4120373 at *4 (C.D. 2012), Chavez v. Lewis, 2012
12 WL 538242 at *8 (N.D. Cal. 2012).

13 Adding together the periods of time when the statute
14 of limitations was **not tolled (8 months, 4 days + 4**
15 **months, 20 days + 11 days),** results in a total of **1 year,**
16 **1 month and 5 days,** which is beyond the one year statute
17 of limitations mandated by 28 U.S.C. § 2244(d)(1)(A).
18 Accordingly, Petitioner failed to file his Petition for
19 Writ of Habeas Corpus in a timely fashion and it is
20 therefore barred.

21 2. Petitioner is Not Entitled to Equitable Tolling
22 of the Statute of Limitations

23 Petitioner does not argue that he is entitled to
24 equitable tolling of the statute of limitations. However,
25 Respondent argues that Petitioner's Petition is not
26 entitled to equitable tolling of the statute of limita-
27 tions.

28 The U.S. Supreme Court has held that equitable
tolling is available under 28 U.S.C. § 2244(d). see

1 Holland v. Florida, 130 S.Ct. 2549, 2554, 2562 (2010). In
2 Holland, the Court recognized equitable tolling of the
3 AEDPA one-year limitations period when the prisoner can
4 show "(1) that he has been pursuing his rights diligently,
5 and (2) that some extraordinary circumstance stood in his
6 way." Id. at 2562 (quoting Pace, 544 U.S. at 418). The
7 Ninth Circuit has held that AEDPA's one-year statute of
8 limitations is subject to equitable tolling. Calderon v.
9 United States Dist. Court (Beeler), 128 F.3d 1283, 1288
10 (9th Cir. 1997), overruled on other grounds by Calderon v.
11 United States Dist. Court (Kelly), 163 F.3d 530, 540 (9th
12 Cir. 1998). However, the Ninth Circuit in Beeler noted
13 that "equitable tolling will not be available in most
14 cases, as extensions of time will only be granted if
15 'extraordinary circumstances' beyond a prisoner's control
16 make it impossible to file a petition on time." Id.
17 [quoting Alvarez-Machain v. United States, 107 F.3d 696,
18 701 (9th Cir. 1996)]. The Beeler court wrote that district
19 judges must "take seriously Congress's desire to acceler-
20 ate the federal habeas process" and "only authorize
21 extensions when this high hurdle is surmounted." Id. at
22 1289.

23 The burden is on Petitioner to show that the "ex-
24 traordinary circumstances" he has identified were the
25 proximate cause of his untimeliness, rather than merely a
26 lack of diligence on his part. Spitsyn v. Moore, 345 F.3d
27 796, 799 (9th Cir. 2003); Stillman v. LaMarque, 319 F.3d
28 1199, 1203 (9th Cir. 2003). Equitable tolling "is unavail-

1 able in most cases." Miles v. Prunty, 187 F.3d 1104, 1107
2 (9th Cir. 1999). "[T]he threshold necessary to trigger
3 equitable tolling (under AEDPA) is very high, lest the
4 exceptions swallow the rule." Miranda v. Castro, 292 F.3d
5 1063, 1066 (9th Cir. 2002).

6 The obligation to act diligently "does not pertain
7 solely to the filing of the federal habeas petition,
8 rather it is an obligation that exists during the period
9 appellant is exhausting state court remedies as well." Roy
10 v. Lampert, 465 F.3d 964, 972 (9th Cir. 2006) citing Lacava
11 v. Kyler, 398 F.3d 271, 277 (3rd Cir. 2005). When courts
12 assess a habeas petitioner's argument in favor of equita-
13 ble tolling, they must conduct a "highly fact-dependent"
14 inquiry. Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th
15 Cir. 2000), Lott v. Mueller, 304 F.3d 918, 923 (9th Cir.
16 2002). The extraordinary circumstances must be the "but-
17 for and proximate cause" of the untimely filing. Allen v.
18 Lewis, 255 F.3d 798, 800 (9th Cir. 2001).

19 Here, Petitioner has not presented anything to the
20 Court to suggest that his Petition is entitled to equita-
21 ble tolling of the statute of limitations. Consequently,
22 the Court finds that Petitioner's Petition is not entitled
23 to equitable tolling of the statute of limitations.

24 III

25 CONCLUSION AND RECOMMENDATION

26 After a thorough review of the record in this
27 matter, the Court has determined that Petitioner has
28 failed to comply with the AEDPA's statute of limitations

1 and that he is not entitled to equitable tolling of the
2 statute of limitations. 28 U.S.C.A. § 2244(d).

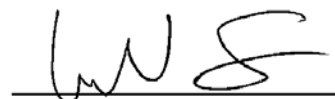
3 Accordingly, the Court RECOMMENDS that Respondent's
4 Motion to Dismiss be GRANTED.

5 This Report and Recommendation of the undersigned
6 Magistrate Judge is submitted to the United States Dis-
7 trict Judge assigned to this case, pursuant to the provi-
8 sion of 28 U.S.C. § 636(b)(1).

9 **IT IS ORDERED** that no later than September 6, 2013,
10 any party to this action may file written objections with
11 the Court and serve a copy on all parties. The document
12 should be captioned "Objections to Report and Recommenda-
13 tion."

14 **IT IS FURTHER ORDERED** that any reply to the objec-
15 tions shall be filed with the Court and served on all
16 parties no later than September 20, 2013. The parties are
17 advised that failure to file objections within the speci-
18 fied time may waive the right to raise those objections on
19 appeal of the Court's order. Martinez v. Ylst, 951 F.2d
20 1153 (9th Cir. 1991).

21
22
23 DATED: August 13, 2013

24
25 

26 Hon. William V. Gallo
27 U.S. Magistrate Judge
28